A

Chin Min Hua & Ors v Eagaivallinayagi Ammal

B HIGH COURT (PENANG) — CIVIL SUIT NO 22–761 OF 2009
ABDUL WAHAB MOHAMED JC
9 JUNE 2017

C *Contract — Sale and purchase of land — Specific performance — Whether plaintiffs entitled to relief of specific performance of the sale and purchase agreement — Specific Relief Act 1950 s 11(2)*

D *Limitation — Specific performance — Agreement for sale of land — Whether plaintiffs' claim was barred by limitation and/or doctrine of laches — Limitation Act 1953 s 9*

E The plaintiffs were the lawful heirs of the deceased purchaser, Chin Teik Yoon @ Chin Tit Boon ('the purchaser'). The defendant was the holder of a power of attorney over a piece of land referred to as Geran Mukim No 325, Lot 725, Mukim 5, Daerah Seberang Perai Selatan, Pulau Pinang ('the land') for Selvarajah a/l Ratnam, deceased ('the vendor') and the defendant had managed all transactions of the land. A sale and purchase agreement dated 23 May 1996 ('SPA') was entered into between the parties to purchase the land. Clause 2(a) F of the SPA provided that upon execution of the SPA, the vendor was to deliver a duly executed memorandum of transfer/Form 14A of the National Land Code ('MOT') to the purchaser's solicitors. A letter dated 27 May 1996 was sent by the defendant's solicitor to the purchaser's solicitor informing that the MOT would be delivered upon payment of the 10% deposit. It was common G ground that the purchaser had paid and the vendor had received the 10% deposit. The plaintiffs pleaded that the MOT was never delivered while the defendant contended that the MOT had been delivered to the purchaser's solicitors. The plaintiffs further alleged that the defendant's solicitor had failed to inform the purchaser's solicitor about the status of the eviction of the H squatters residing on the land within the prescribed period. The defendant pleaded that the plaintiff had failed to make any payment towards the balance purchase price and the defendant had through her solicitor terminated the SPA by a notice of termination letter dated 27 June 2001 addressed to the plaintiff's solicitor. Hence, the plaintiffs brought this action against the defendant for the I specific performance of the SPA. The issues for consideration were: (a) whether the MOT was delivered to the purchaser's solicitor as per the terms of the SPA; (b) whether the plaintiffs were entitled to the relief of specific performance of the SPA and such other consequential relief arising there from; (c) whether the plaintiffs' claim was barred by limitation and/or doctrine of laches; and

(d) whether the defendant was entitled to terminate the SPA, forfeit the 10% deposit and be entitled to retain ownership of the property under the SPA. A

Held, granting judgment to the plaintiffs and dismissing the defendant's counterclaim with costs of RM20,000:

B

(1) The defendant had failed to produce any evidence of the service letter showing any acknowledgement of service of the MOT. From a plain reading of the terms of the SPA, the duty to deliver the MOT to the purchaser's solicitor was on the defendant, hence proof of such service being made fell squarely on the defendant. Other than the testimonial evidence of DW3 at trial stating that he distinctly remembered serving the MOT on the purchaser's solicitor personally, no further evidence was brought to show that such service was in fact effected. Thus, the defendant in failing to deliver and/or prove that such service of the MOT was made to purchaser's solicitor had breached the fundamental terms of the SPA (see para 32). C D

(2) The plaintiff was entitled to the option of either to continue with the agreement or to rescind it as the defendant had breached the contract. However, the purchaser did not rescind the SPA and had by his conduct treated the SPA as still subsisting. The defendant had not in any way treated the SPA as being rescinded and this was obvious from the letter dated 30 June 1997 supported by DW3's evidence trial that acting upon the defendant's instruction, the defendant's solicitor issued the letter to the purchaser's solicitors inquiring the status of the SPA. In the absence of either parties' intention to rescind the SPA upon breach by the defendant, the SPA remained in existence and that the time as stipulated in the SPA ceased to be of essence of the SPA and became at large (see paras 41–43). E F

(3) Pursuant to the terms of the SPA, the purchaser's and/or the plaintiffs' duty to make payment for the balance purchase price shall only arise upon delivery of the duly executed MOT of which the defendant had failed to prove. The defendant had however failed to take any positive steps to issue a notice of demand for payment of the balance purchase price from the purchaser, the defendant never requested for the RM20,000 to be paid to the squatters as stipulated in the SPA and the defendant had failed to issue any notice of termination after the expiry of completion date. The period of limitation had begun only from the first clear and unequivocal threat to the purchaser's right to the transfer of the land that was on 27 June 2001 where the defendant had instructed her solicitor to issue a notice of termination to the purchaser. The plaintiffs having filed their claim against the defendant on 3 December 2009 was well within the 12 years period and was therefore not time-barred (see paras 49–51). G H I

(4) No steps had been taken by the defendant to deal with the property. There was no evidence of any disposition to a third party. In fact, the squatters were still residing on the said land throughout the years since the execution of the SPA and no evidence was adduced to show that the squatters had vacated the land. There never was acquiescence on the part of the purchaser and/or plaintiffs. The purchaser and subsequently the plaintiffs had at all times entered caveat onto the land so as to protect their interest in the land. This did not appear to be a case where laches would apply so as to defeat the plaintiffs' claim (see paras 62–64).

(5) Despite the defendant's breach, the purchaser and/or plaintiffs had at all times been ready and willing to perform their part of the terms under the SPA, and this was evident from the correspondence letters between the purchaser's solicitors and the defendant's solicitors indicating that the purchaser was at all times ready and willing to pay the balance purchase price had the purchaser received some form of security from the defendant in respect of the sale and purchase transaction of the land. The defendant had failed to rebut the presumption under s 11(2) of the Specific Relief Act 1950 ('the SRA'). The plaintiffs had proved their claims to this court's satisfaction on the balance of probabilities (see paras 75–77).

[Bahasa Malaysia summary

Plaintif-plaintif adalah waris kepada pembeli yang sudah mati, Chin Teik Yoon @ Chin Tit Boon ('pembeli'). Defendan adalah pemegang surat kuasa peguambela di atas satu tanah yang dirujuk sebagai Geran Mukim No 325, Lot 725, Mukim 5, Daerah Seberang Perai Selatan, Pulau Pinang ('tanah') untuk Selvarajah a/l Ratnam, si mati ('penjual') dan defendan telah menguruskan segala transaksi tanah itu. Perjanjian jual beli bertarikh 23 Mei 1996 ('SPA') telah dimeterai antara pihak-pihak untuk membeli tanah tersebut. Klausa 2(a) SPA menyatakan bahawa apabila SPA dilaksanakan, penjual akan menyerahkan memorandum pindah milik/Borang 14A Kanun Tanah Negara ('MOT') yang sempurna kepada peguam pembeli. Surat bertarikh 27 Mei 1996 telah dihantar oleh peguam defendan kepada peguam pembeli menyatakan bahawa MOT akan diserahkan setelah pembayaran deposit 10%. Adalah persamaan bahawa pembeli telah membayar dan penjual telah menerima deposit 10%. Plaintif-plaintif telah memplidkan bahawa MOT tidak pernah diserahkan manakala defendan mengatakan bahawa MOT telah diserahkan kepada peguam pembeli. Plaintif-plaintif seterusnya mendakwa bahawa peguam defendan telah gagal untuk memaklumkan kepada peguam pembeli tentang status pengusiran penduduk setinggan yang tinggal di tanah itu dalam tempoh yang ditetapkan. Defendan telah memplidkan bahawa plaintif telah gagal untuk membuat sebarang bayaran terhadap baki harga belian dan defendan telah melalui peguamnya menamatkan SPA dengan notis surat penamatan bertarikh 27 Jun 2001 beralamatkan kepada peguam

plaintif. oleh itu, plaintif-plaintif membawa tindakan ini terhadap defendan untuk perlaksanaan spesifik SPA. Isi-isu pertimbangan adalah: (a) sama ada MOT telah diserahkan kepada peguam pembeli mengikut terma SPA; (b) sama ada plaintif-plaintif mempunyai hak untuk relif perlaksanaan spesifik SPA dan relif akibat lain yang timbul; (c) sama ada tuntutan plaintif-plaintif telah dihalang dengan keterbatasan dan/atau doktrin kecuaian; dan (d) sama ada defendan berhak untuk menamatkan SPA, merampas deposit 10% dan berhak untuk mengekalkan pemilikan tanah tersebut di bawah SPA.

Diputuskan, memberikan penghakiman kepada plaintif-plaintif dan menolak tuntutan balas defendan dengan kos sebanyak RM20,000:

(1) Defendan telah gagal untuk mengemukakan apa-apa keterangan surat penyerahan yang menunjukkan sebarang pemakluman penerimaan penyerahan MOT. Dari bacaan jelas terma-terma SPA, tanggung jawab untuk menyerahkan MOT kepada peguam pembeli adalah di atas defendan, oleh itu bukti penyerahan sedemikian jatuh pada defendan. Selain daripada keterangan testimoni DW3 dalam perbicaraan menyatakan bahawa beliau mengingati secara jelas menyerahkan MOT secara peribadi kepada peguam pembeli, tiada keterangan lanjut telah dibawa untuk menunjukkan penyerahan tersebut sebenarnya dilaksanakan. Dengan itu, defendan yang gagal menyerahkan dan/atau membuktikan penyerahan MOT telah dibuat kepada peguam pembeli telah melanggar terma asas SPA (lihat perenggan 32).

(2) Plaintif berhak kepada pilihan sama ada untuk meneruskan perjanjian atau membatalkannya memandangkan defendan telah melanggar kontrak. Walau bagaimanapun, pembeli tidak membatalkan SPA dan dengan perlakuannya memperlakukan SPA seperti masih wujud. Defendan tidak pernah memperlakukan SPA sebagai terbatal dan ini jelas dari surat bertarikh 30 Jun 1997 yang disokong oleh keterangan dalam perbicaraan DW3 bahawa atas perintah defendan, peguam defendan telah mengeluarkan surat tersebut kepada peguam pembeli menanyakan status SPA. Dengan ketiadaan niat mana-mana pihak untuk membatalkan SPA selepas perlanggaran oleh defendan, SPA kekal wujud dan masa yang ditetapkan dalam SPA berhenti daripada menjadi keutamaan SPA dan menjadi umum (lihat perenggan 41–43).

(3) Mengikut terma SPA, tanggung jawab pembeli dan/atau plaintif-plaintif untuk membuat bayaran baki harga belian hanya akan timbul setelah penyerahan MOT yang sempurna di mana telah gagal untuk dibuktikan oleh defendan. Defendan walau bagaimanapun telah gagal untuk mengambil sebarang langkah positif untuk mengeluarkan notis tuntutan untuk bayaran baki harga belian daripada pembeli, defendan tidak pernah meminta RM20,000 untuk dibayar kepada penduduk setinggan seperti yang ditetapkan dalam SPA dan defendan telah gagal untuk

mengeluarkan sebarang notis penamatan selepas tamat tempoh tarikh penyelesaian. Tempoh keterbatasan hanya bermula dari ancaman pertama yang jelas dan tegas kepada hak pembeli untuk memindahkan tanah tersebut pada 27 Jun 2001 di mana defendan telah mengarahkan peguam beliau untuk mengeluarkan notis penamatan kepada pembeli. Plaintif-plaintif yang memfailkan tuntutan mereka terhadap defendan pada 3 Disember 2009 adalah dalam tempoh 12 tahun dan oleh itu tidak dihalang oleh masa (lihat perenggan 49–51).

(4) Tiada langkah-langkah telah diambil oleh defendan untuk mengurus tanah itu. Tiada keterangan tentang apa-apa penyelesaian kepada pihak ketiga. Malah, penduduk setinggan masih menetap di tanah tersebut sepanjang tahun sejak pelaksanaan SPA dan tiada keterangan ditambah untuk menunjukkan penduduk setinggan telah mengosongkan tanah itu. Tidak pernah ada persetujuan di pihak pembeli dan/atau plaintif-plaintif. Pembeli dan kemudiannya plaintif-plaintif telah pada setiap masa memasuki kaveat ke atas tanah tersebut untuk melindungi kepentingan mereka di tanah itu. Ini tidak nampak sebagai kes di mana kecuaian akan digunakan untuk mengalahkan tuntutan plaintif-plaintif (lihat perenggan 62–64).

(5) Walaupun pelanggaran defendan, pembeli dan/atau plaintif-plaintif telah pada setiap masa bersedia dan sanggup untuk melaksanakan peranan mereka di bawah terma-terma SPA, dan ini terbukti daripada surat-menyurat di antara peguam pembeli dan peguam defendan menyatakan bahawa pembeli pada setiap masa bersedia dan sanggup untuk membayar baki harga belian apabila pembeli menerima beberapa bentuk jaminan daripada defendan berkenaan dengan transaksi jual beli tanah itu. Defendan telah gagal untuk mematahkan anggapan di bawah s 11(2) Akta Relief Spesifik 1950 ('ARS'). Plaintif-plaintif telah membuktikan tuntutan mereka mengikut kepuasan mahkamah ini di atas imbangan kebarangkalian (lihat perenggan 75–77).]

Notes

For cases on specific performance, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6714–6727.

For cases on agreement for sale of land, see 9 *Mallal's Digest* (5th Ed, 2015) paras 2608–2609.

Cases referred to

Caesar Lamare v Thomas Dixon [1873] 6 LRHL 414, HL (refd)

Chappell v Times Newspapers Ltd [1975] 1 WLR 482, CA (refd)

Chin Tai v Siow Shiow & Ors [1971] 1 MLJ 67, FC (refd)

Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor [2011] 6 MLJ 464; [2011] 9 CLJ 257, FC (refd)

Emile Erlanger & Ors v New Sombrero Phosphate Co & Ors (1878) 3 App Cas 1218, HL (refd)
Ganam d/o Rajamany v Somoo s/o Sinnah [1984] 2 MLJ 290; [1984] 2 CLJ 268; [1984] 1 CLJ Rep 123, FC (refd)
Goh Hooi Yin v Lim Teong Ghee & Ors [1990] 3 MLJ 23; [1990] 2 CLJ Rep 48, HC (refd)
Haji Hasnan v Tan Ah Kian [1963] MLJ 175; [1963] 1 LNS 32, CA (refd)
Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd [1986] AC 207; [1985] 2 All ER 966, HL (refd)
Hassan v Ismail [1970] 1 MLJ 210, FC (refd)
Lazard Brothers & Co Ltd v Fairfield Properties Co (Mayfair) Ltd [1977] 121 SJ 793, Ch D (refd)
Lindsay Petroleum Co v Hurd (1874) LR 5 PC 221, PC (refd)
Loh Koon Moy & Anor v Zaibun SA bt Syed Ahmad [1978] 2 MLJ 29, FC (refd)
Loo Choo Teng & Anor v Cheok Swee Lee & Ors and another appeal [2000] 2 MLJ 257, CA (refd)
Milward v Earl of Thanet [1801] 5 Ves Jun 719, CA (refd)
Nasri v Mesah [1971] 1 MLJ 32, FC (refd)
Padang Serai Kilang Kayu Bhd v Khor Kia Fong & Ors [1998] 1 MLJ 589; [1997] 5 CLJ 428, HC (refd)
Sekemas Sdn Bhd v Lian Seng Co Sdn Bhd [1989] 2 MLJ 155, SC (refd)
Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151; [1983] 1 CLJ 178; [1983] CLJ Rep 363, FC (refd)
Tan Kok Chuan & Anor v Liew Nam Foong [2000] MLJU 76; [2000] 5 CLJ 533, HC (refd)
Tay Tho Bok & Anor v Segar Oil Palm Estate Sdn Bhd [1996] 3 MLJ 181, HC (refd)
Turner v Bladin [1951] 82 CLR 463, HC (refd)
Wong Kup Sing v Jeram Rubber Estates Ltd [1969] 1 MLJ 245, HC (refd)
Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors [2015] 6 MLJ 810, CA (refd)
Yeow Kim Pong Realty Ltd v Ng Kim Pong [1962] MLJ 118; [1961] 1 LNS 157, PC (refd)
Yong Kon Fatt & Anor v Hock Seng Construction Sdn Bhd & Anor [2000] 5 MLJ 551, HC (refd)
Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd [1979] 1 MLJ 182; [1978] 1 LNS 244, FC (folld)

Legislation referred to

Contracts Act 1950 s 56, 56(1)
Evidence Act 1950 ss 101, 102
Limitation Act 1953 ss 9, 9(1), 32
National Land Code Form 14A
Specific Relief Act 1950 ss 11(2), 20, 20(1)(a), 21, 23(b)

Vincent Tey (Jublin Tan & Tey) for the plaintiffs.
Darshan Singh (Manjit Singh with him) (Darshan, Syed, Amarjit & Partners) for the defendant.

Abdul Wahab Mohamed JC:

INTRODUCTION

[1] The plaintiffs are the lawful heirs of the deceased purchaser, Chin Teik Yoon @ Chin Tit Boon ('the purchaser').

[2] The defendant was at all material times the holder of a power of attorney over a piece of land referred to as Geran Mukim No 325, Lot 725, Mukim 5, Daerah Seberang Perai Selatan, Pulau Pinang ('the land') for Selvarajah a/l Ratnam, the deceased ('the vendor') and the defendant had managed all transactions of the said land.

[3] The plaintiffs brought this action against the defendant for the specific performance of the sale and purchase agreement dated 23 May 1996 for the purchase of a land referred to as Geran Mukim No 325, Lot 725, Mukim 5, Daerah Seberang Perai Selatan, Pulau Pinang ('the land').

[4] The plaintiffs in this suit claim for the following reliefs against the defendant:

(a) specific performance of the sale and purchase agreement;

(b) an order that the defendant deliver to the plaintiffs a memorandum of transfer executed by the defendant;

(c) an order that within fourteen days from the date of judgment, the defendant takes proper steps to evict the squatters from the said land;

(d) an order that the defendant gives vacant possession within 30 days of the date of the judgment;

(e) general damages to be assessed;

(f) costs to be borne by the defendants; and

(g) any further or other relief which this court deems fit and just.

[5] The defendant counterclaimed as follows:

(a) an order that the plaintiff remove the private caveat entered on the said land by the plaintiff within seven days from the date of the judgment;

(b) general damages to be assessed;

(c) costs to be borne by the plaintiffs; and

(d) any further or other relief which this court deems fit and just.

BACKGROUND FACTS

[6] A sale and purchase agreement dated 23 May 1996 ('SPA') was entered into between Chin Teik Yoon @ Chin Tit Boon, the deceased ('the purchaser') and the defendant Eagaivallinayagi Ammal (as attorney of the registered owner Salvarajah a/l Ratnam) to purchase the said land.

[7] According to the SPA, it is agreed between the vendor and the purchaser that payment of the purchase price is to be settled in the following manner:

(a) RM21,367.36 — to be paid upon execution of the agreement;

(b) RM20,000 — to be paid when requested by the vendor's solicitors after three months but the sum shall be held by the purchaser's solicitors as stakeholder to be paid to two known squatters to vacate their premises;

(c) RM172,306.24 — to be paid within ninety days of the agreement (or within an extended period of further 60 days).

[8] In compliance with the terms of the SPA, the purchaser had paid a sum of RM19,078 to the defendant after deducting the sum of RM2,280.36 from the said deposit which was paid to the option holder as directed by the defendant's solicitors.

[9] Clause 2(a) of the SPA further provides that upon execution of the SPA, the vendor is to deliver a duly executed memorandum of transfer/Form 14A of the NLC ('MOT') to the purchaser's solicitors.

[10] A letter dated 27 May 1996 was sent by the defendant's solicitor to the purchaser's solicitor informing the purchaser's solicitor that the MOT would be delivered to the purchaser's solicitors upon payment of the 10% deposit. It is common ground that the purchaser had paid and the vendor had received the 10% deposit.

[11] It is the plaintiffs' pleaded case that the MOT was never delivered to the solicitors for the purchaser notwithstanding requests for the same. The defendant however contended that the MOT was delivered to the purchaser's solicitors.

[12] The plaintiffs further alleged that the defendant's solicitor had failed to inform the purchaser's solicitor about the status of the eviction of the squatters residing on the said land within the prescribed period.

[13] It is the defendant's pleaded case that the plaintiff had failed to make any payment towards the balance purchase price and the defendant had through her solicitor, Messrs Beevan & Co terminated the SPA by a notice of termination letter dated 27 June 2001 addressed to the plaintiff's solicitor.

THE PLAINTIFFS' SUBMISSION

[14] With regards to the delivery of MOT by the defendant, it is the plaintiffs' submission that the defendant had failed to deliver the MOT to the purchaser's solicitor following the terms of the SPA. The plaintiffs had adduced three letters dated 2 August 1996, 12 August 1996 and 21 November 1996 respectively ('the three letters') to support its claim that requests were made by the purchaser's solicitor for the delivery of MOT.

[15] It is the plaintiffs' further submission that the defendant had not adduced any documentary evidence to prove that the MOT had been duly delivered by the defendant to the purchaser. The plaintiffs contended that SD3's, the solicitor who represented the vendor in the SPA transaction at the material time in 1996, evidence was that he distinctly recalls personally delivering the MOT to the purchaser's solicitors some 21 years ago but SD3 had failed to produce his service letter showing any acknowledgement of service of the MOT by the vendor's solicitors.

[16] The plaintiffs claimed for specific performance and submitted that the plaintiffs are at all times ready, willing and able to complete his obligations to pay the balance purchase price. The plaintiffs referred to the case of *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23; [1990] 2 CLJ Rep 48 in supporting their contention that 'having access to funds' is sufficient proof of 'ready, willing and able'.

[17] The plaintiffs submitted that the time when the cause of action accrues to the plaintiffs is upon the first clear and unequivocal threat to the plaintiff's right to possession which was on 27 June 2001 and not on the date of breach of the contract by the defendant as it is the plaintiff's case that both parties had treated the SPA as being afoot after the expiry of the date of completion of the SPA.

[18] The plaintiffs further submitted that although there was a stipulation that 'time was the essence', both by words and conduct, the purchaser and vendor had behaved as if the SPA was afoot right up to June 2001 when the vendor elected to wrongfully repudiate the SPA.

THE DEFENDANT'S SUBMISSION

[19] It is the defendant's submission that the earliest time at which the action could have been brought to court had begun in 1996 and that this matter should have been filed within 12 years by the latest 20 August 2008. However, this matter was only filed in court on 3 December 2009 which is after the limitation period. It is therefore the defendant's contention that this matter is time barred pursuant to s 9(1) of the Limitation Act 1953.

[20] The defendant further submits that the doctrine of laches also applies in this case as the purchaser never did anything at all in his entire life time, clearly showing his intentions to not proceed further in the purchase of the land and that it was only after the purchaser's demise, the estate ('children') brought this case to the High Court after almost 14 years.

[21] The defendant disputed the three letters alleging that they were fabricated by the purchaser's solicitor for the purpose of showing the vendor's negligence in fulfilling her obligation under the SPA as follows:

(a) for the non-delivery of MOT; and

(b) for not clearing the squatters.

[22] It is also the defendant's submission, with regards to the said three letters, that SD3 had confirmed in his testimony at trial that he had never received the said three letters.

ISSUES TO BE TRIED

[23] In my view, the following key issues arose for my determination:

(a) whether or not MOT was delivered to the purchaser's solicitor as per the terms of the SPA;

(b) whether the plaintiffs are entitled to the relief of specific performance of the SPA and such other consequential relief arising there from;

(c) whether the plaintiffs' claim is barred by limitation and/or doctrine of laches; and

(d) whether the defendant is entitled to terminate the SPA, forfeit the 10% deposit and be entitled to retain ownership of the property under the SPA.

THE COURT'S FINDING

Memorandum of transfer ('MOT')

[24] It is pertinent to note here that there is no dispute between parties that a sale and purchase agreement had been entered into between the purchaser and the defendant dated 23 May 1996 for the sale and purchase of the land and that the 10% deposit for the said sale and purchase had been paid by the purchaser to the defendant.

[25] Issues however arose in regards to the delivery of the MOT as follows:

(a) it is the plaintiffs' pleaded case that MOT was never received by the purchaser's solicitors despite written requests were made for the supply of the said MOT. The plaintiffs had adduced three letters dated 2 August 1996, 12 August 1996 and 21 November 1996 respectively ('the three letters') in support of this point and this was further affirmed by PW2 at trial;

(b) it is the defendant's contention that MOT was delivered to the purchaser's solicitors. The defendant had further through DW3, the solicitor who represented the vendor in the SPA transaction at the material time in 1996,denied receipt of the three letters; and

(c) the defendant further contended that in the event MOT was not delivered by the defendant's solicitor, that the purchaser's solicitor was liable for its negligence in failing to request for the delivery of the MOT within the stipulated time frame.

[26] The defendant had rightly referred to the case of *Yeohata Machineries Sdn Bhd & Anor v Coil Master Sdn Bhd & Ors* [2015] 6 MLJ 810 in its submission in respect of burden of proof where Court of Appeal stated as follows:

> In law, the party who desires the court to give judgment in its favour as to any legal right or liability bears the burden of proof (s 101(1) of the Evidence Act 1950). The burden of proof on that party is two fold: (i) the burden of establishing a case; and (ii) the burden of introducing evidence. The burden of proof lies on the party throughout the trial. The standard of proof required of the plaintiff is on the balance of probabilities. The evidential burden of proof is only shifted to the other party once that party has discharged its burden of proof. If that party fails to discharge the original burden of proof, then the adverse party does not need to adduce any evidence. In this respect it is the plaintiffs who must establish their case of infringement. If the plaintiffs fail to do so, it will not do for the plaintiffs to say that the defendants have not established their defence (*Selvaduray v Chinniah* [1939] MLJ 253 (CA); s 102 of the Evidence Act 1950). It should also be noted that there must be some preponderance in the plaintiffs' favour at the conclusion of the whole case. Even if the plaintiffs had established a prima facie case, but if at the conclusion of the trial the court finds that the position was exactly even, then any preponderance in favour of the plaintiffs has ceased to exist. If that happens, then the plaintiffs have failed to discharge the burden of proof which is upon it, and the

plaintiffs must necessarily fail (*Abrath v North Eastern Railway Co* [1883] 11 QBD 440 at p 452 (CA)). A

[27] Sections 101 and 102 of the Evidence Act 1950 provides as follows:

101 Burden of proof B

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. C

102 On whom burden of proof lies

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. D

[28] In dealing with this point, I will first refer to cl 2(a) of the SPA under the heading 'memorandum of transfer' which provided as follows:

Upon the execution of this agreement the vendor(s) and the purchaser(s) shall execute a memorandum of transfer of the said property in favour of the purchaser(s) or his nominees and deliver the same to the purchaser(s)' solicitors whose particulars are set out in Part 9 of the FIRST SCHEDULE hereto and the purchaser's solicitors are hereby irrevocably authorised to submit the same for adjudication and stamping only. E F

[29] From the reading of cl 2(a) of the SPA and in reference to the authorities above, it is obvious that the duty to deliver the duly executed MOT was placed on the defendant. The defendant claimed that MOT was delivered of which the plaintiff denied. If no evidence were given on either side, the plaintiff would succeed in claiming that delivery of MOT was not effected. Therefore, the evidential burden of proof is on the defendant to prove that the MOT was delivered to the purchaser's solicitor. G

[30] The defendant claimed that MOT was delivered to the purchaser's solicitor and DW3's evidence at trial was that he distinctly recalls personally delivering the MOT to the purchaser's solicitors and that receipt of the MOT had been acknowledged by the purchaser's solicitor. DW3 also testified that he returned his file to the defendant sometime in 2001 and that the service letter ought to be in the file. H I

[31] The defendant relied on a letter dated 23 May 1996 addressed to the purchaser's solicitor confirming that the defendant had duly executed the MOT in respect of the said land and that it shall be forwarded once deposit

payment was made. It is agreed between parties before me that the deposit was duly paid by the purchaser and received by the defendant on the 29 May 1996.

[32] Based on the evidence adduced before me, the defendant had failed to produce any evidence of the service letter showing any acknowledgement of service of the MOT. Not only did the defendant fail to prove service of the MOT, the defendant had in this case sought to turn the table and place the burden on the plaintiffs to prove that requests for MOT were made. From a plain reading of the terms of the SPA, it is an express term of the SPA that the duty to deliver MOT to the purchaser's solicitor was on the defendant, hence proof of such service being made falls squarely on the defendant. Other than the testimonial evidence of DW3 at trial stating that he distinctly remembers serving the MOT on the purchaser's solicitor personally, no further evidence was brought to this court to show that such service was in fact effected. The defendant had in my considered view, in failing to deliver and/or prove that such service of the MOT was made to purchaser's solicitor, breached the fundamental terms of the SPA.

Time is of the essence

[33] I shall now consider the next issue in question where time is of the essence of the contract. The defendant alleged that the plaintiffs had failed to adhere to the terms of the SPA in failing to make payment for the balance purchase price within the stipulated time as provided for under the First Schedule of the SPA.

[34] The plaintiffs had however contended that although there was a stipulation that 'time was the essence' contained in the SPA, however, both by words and conduct, the purchaser and vendor had behaved as if the SPA was a foot right up to June 2001 when the vendor elected to repudiate the SPA. The plaintiffs had in support of its contention relied on the Federal Court case of *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464; [2011] 9 CLJ 257 and the relevant passage of the decision as extracted by the plaintiff in the present case is reproduced herein as follows:

> ... it is trite law that a contract need not contain such a term or clause for time to be made of the essence in the same way 'that a stipulation as to time must be read along with other provisions of the contract to determine if time is truly of the essence of the contract' (see *Berjaya Times Square Sdn Bhd v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269). Thus, whether or not time had been intended to be of the essence would depend on the conduct and the dealings of the parties. There is no necessity in law that a clause making time of essence must be expressed in any given contract. Similarly, the fact that there is a clause stating that time is to be of the essence does not ipso facto result in time being of the essence.
>
> In the case of *Mohammed Ibrahim & Anor v Mohammed Abdul Razak* AIR 2007 AP 294 the High Court of India observed that 'it is settled law, merely because there is

a mention in the agreement making time as essence of the contract, it does not mean that such time is made an essence of the contract. The court has to decide the same while taking into consideration the intention of parties in making such a stipulation, their conduct and surrounding circumstances'.

[35] The plaintiffs further relied on a letter dated 30 June 1997 wherein the defendant's solicitor had written to the purchaser's solicitors inquiring the status of the SPA which indicated that both parties had treated the SPA as a foot until 27 June 2001 and time was at large as to the fulfilment of respective obligations.

[36] In respect of this issue, I shall first advert to some general principles of law governing the effect of a contract where time is of the essence. Seah FJ, in delivering the judgment in the Federal Court case of *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290; [1984] 2 CLJ 268; [1984] 1 CLJ Rep 123 had this to say in regard to time being the essence of the contract:

> In a contract for the sale of land the time fixed by the parties for completion or performance is not to be strictly construed unless it is the intention of the parties that time should be of the essence of the contract (see *Jamshed v Burjorji* AIR 1915 PC 83, *Stickney v Keeble* [1915] AC 386, *Warren v Tay Say Geok & Ors* [1965] 1 MLJ 44; [1964] 1 LNS 46, and s 56(1) of the Contracts Act 1950). Intention may either be express or implied and there are three cases in which time is of the essence of the contract.
>
> (a) where the contract expressly states that time shall be of the essence of the contract (*Steedman v Drinkle* [1916] 1 AC 275 and *Brickles v Snell* [1916] 2 AC 599);
>
> (b) where time was not originally of the essence of the contract but has been made so by one party giving a notice to the other. Such notice can only be given after the other party has been guilty of unreasonable delay and the time mentioned in the notice must be reasonable (*Stickney v Keeble*);
>
> (c) where from the nature of the property time may be considered to be of the essence of the contract (*Tilley v Thomas* [1867] 3 Ch App 61).

[37] These three principles are cited by the then Court of Appeal in the case of *Haji Hasnan v Tan Ah Kian* [1963] MLJ 175; [1963] 1 LNS 32.

[38] In *Yeow Kim Pong Realty Ltd v Ng Kim Pong* [1962] MLJ 118; [1961] 1 LNS 157, the Privy Council said at p 120:

> The question whether time is the essence of a contract is one to be determined by ascertaining the real intention of the parties. This is to be gathered by the examination amongst other things of attendant circumstances.

[39] The case of *Chye Fook* dealt with late completion of a building where

time was of the essence of the contract. And the specific question which Abdul Malek bin Ahmad J, (as he then was) had to answer in that case pertained to the question of whether the purchaser could sue for rescission on the agreement when the house was not completed on the completion date. On the options that were available to the purchaser, this was what His Lordship said:

> Section 56 of the Contracts Act 1950 states that a contract is voidable at the option of the promisee if the intention of the parties was that time should be the essence of the contract but if it was otherwise the promisee is entitled to compensation from the promisor for any loss occasioned to him by the latter's failure to do the thing at or before the specified time. In this particular instance, I was of the view that the first limb of the section applied. *Therefore, time was the essence of the contract and the contract was voidable. Consequently, since the building was not completed within 24 months from the date of the agreement, the purchaser plaintiff had the option either to continue with the contract or to rescind it.* (Emphasis added.)

[40] Salleh Abas FJ speaking for the then Federal Court in *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151; [1983] 1 CLJ 178; [1983] CLJ Rep 363 had this to say of s 56 of the Contracts Act 1950:

> However, the rules contained in s 56 of the Contracts Act are not different from the position arrived at in common law. *Yeow Kim Pong Realty Ltd v Ng Kim Pong* [1962] MLJ 118; [1961] 1 LNS 157. The position is this: *If in a contract in which time is of the essence, a party fails to perform it by the stipulated time, the innocent party has the right either to rescind the contract, or to treat it as still subsisting. If he treats it either expressly or by conduct as still continuing, the contract exists but time ceases to be of the essence and becomes at large. Consequently, he cannot claim the liquidated damages under the contract unless there is a provision as to the extension of time. However, this cessation can be revived and so time can be restored to be of the essence by the innocent party serving a notice to the party in default giving a new date of completion.* (Emphasis added.)

[41] Returning to the facts of the present case before me, time has been made the essence of the contract pursuant to cl 14 of the SPA. That being the case, s 56(1) of the Contracts Act 1950 should be invoked and that section provides that failure to perform within a fixed time in a contract, where time is essential, would render the contract voidable. Having found that the defendant had failed to deliver the MOT to purchaser's solicitors on the completion date or on the extended period or on or before any other date as promised by the defendant and this constituted a fundamental breach of the contract which entitles the plaintiff to the option of either to continue with the agreement or to rescind it. However, the purchaser did not rescind the SPA and had by his conduct treated the SPA as still subsisting.

[42] The defendant had not in any way treated the SPA as being rescinded and this is obvious from the letter dated 30 June 1997 supported by DW3's evidence trial that acting upon the defendant's instruction, the defendant's

solicitor issued the letter to the purchaser's solicitors inquiring the status of the SPA. The defendant's solicitor did not at any time issue any notice of payment to be made nor any letters enquiring the payment status of the SPA.

[43] Based on the authorities and reasons given above and in considering the totality of evidence before me, in the absence of either parties' intention to rescind the SPA upon breach by the defendant, it is in my considered view that the SPA remained in existence and that the time as stipulated in the SPA ceases to be of essence of the SPA and becomes at large.

Limitation — time bar

[44] The defendant had further alleged that the plaintiffs' claim is time barred pursuant to the provision under s 9(1) of the Limitation Act 1953 which provides as follows:

> (1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.
>
> 1. Reference is made to the Federal Court case of *Nasri v Mesah* [1971] 1 MLJ 32 in relation to the limitation period of action for specific performance of contract of sale of land, where Gill, FCJ had put this:
>
> > It follows, therefore, that whether the action is for specific performance of an agreement for the sale of land or for declaration of title to land, it is essentially an action to recover land, so that the period of limitation would be 12 years in either case.

[45] It is the defendant's contention that taking into consideration that the breach of the SPA would have occurred at the latest in 21 August 1996, this matter should have been filed within 12 years by the latest 20 August 2008. However, this matter was only filed in court on 3 December 2009 which is clearly after the limitation period as submitted by the defendant.

[46] It was further submitted by the defendant that the completion date of the SPA as per Part 10 (First Schedule of S&P) is 90 days from the signing of the agreement. As time is of the essence of the agreement, and the S&P was not completed within 90 days, the S&P is deemed to be breached; the right of action would have begun on 21 August 1996. The plaintiffs argued that the right of action accrues to the plaintiffs on 27 June 2001 ie upon the first clear and unequivocal threat to the plaintiff's right to possession when the notice of termination of the SPA dated the same was issued by the defendant. I shall now proceed to address the issue of whether the plaintiff's claim is time-barred.

[47] According to the Federal Court in the case of *Nasri v Mesah* [1971] 1

MLJ 32, time begins to run for the purposes of limitation from the date of any infringement or threat of infringement of the appellant's right under the agreement. And that a cause of action on a contract accrues on the date of breach and in the case of actions founded on contract, time runs from the breach. Gill FJ delivering the judgment of the Federal Court had this to say at p 34 of the report:

> A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v Brown* [1889] 22 QBD 128 at p 131). In *Reeves v Butcher* [1891] 2 QB 509 at p 511, Lindley LJ said: 'This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland* LR 4 QB 519, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought'. In *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610 at p 617, Viscount Dunedin described 'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field J in *Gibbs v Guild* [1881] 8 QBD 296 at p 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo v Koklan & Ors* LR 57 IA 325). It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run. For the reasons I have stated, the period of limitation in the present case can be said to have begun to run only from the first clear and unequivocal threat to the plaintiff's right to a transfer of the land.

[48] Cause of action arising from a contract here means circumstances where a party in a contract obtains the rights and grounds to institute legal action against the other party who has defaulted the terms and conditions of the contract. For the cause of action to occur, there must have been breach of the contractual duty. Cause of action also means 'a right to sue'. There cannot be 'right to sue' until and unless there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that the right of the defendant against whom the suit is instituted (see *Padang Serai Kilang Kayu Bhd v Khor Kia Fong & Ors* [1998] 1 MLJ 589; [1997] 5 CLJ 428).

[49] As decided earlier on, time was no longer of essence of the SPA in the present case before me. Neither party in this case before me had, expressly or by conduct, treated the SPA as being terminated. Although the breach would have occurred on the date of breach ie when the defendant had failed to deliver the MOT to the purchaser's solicitor. It is in my considered view that pursuant to

the terms of the SPA, the purchaser's and/or the plaintiffs' duty to make payment for the balance purchase price shall only arise upon delivery of the duly executed MOT of which the defendant had failed to prove.

[50] The purchaser had the option of rescinding the SPA or treat as if the SPA was still subsisting. In the present case, the purchaser and/or plaintiffs had by conduct treated the SPA as still subsisting. The defendant had however failed to take any positive steps to issue a notice of demand for payment of the balance purchase price from the purchaser, the defendant never requested for the RM20,000 to be paid to the squatters as stipulated in the SPA and the defendant had failed to issue any notice of termination after the expiry of completion date.

[51] It is only in 27 June 2001 that the defendant had instructed her solicitor to issue a notice of termination to the purchaser. It is therefore in my considered view that the period of limitation in the present case can be said to have begun only from the first clear and unequivocal threat to the purchaser's right to the transfer of the land that is on the 27 June 2001. The plaintiffs having filed their claim against the defendant on 3 December 2009 was well within the 12 years period as provided under s 9 of the Limitation Act 1953 and is therefore not time-barred.

Laches

[52] Next question to be determined by this court is whether or not the plaintiffs' claim is barred by the doctrine of laches. The defendant had in its submission stated that in the present case, the purchaser never did anything at all in his entire life time, clearly showing his intentions to not proceed further in the purchase of the land. After the purchaser's demise, the estate (children) brought this case to the High Court after almost 14 years; therefore the doctrine of laches would apply here.

[53] The doctrine of laches is founded in equity. It may be pleaded in defence to a claim even if the action is brought within the period of limitation. This equitable relief is preserved under s 32 of the Limitation Act 1953 which provides that:

> Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the grounds of acquiescence, laches or otherwise.

[54] The doctrine of laches may be successfully raised in defence if it can be shown that by the plaintiffs' delay or neglect in prosecuting its claim the plaintiffs has acquiesced in the defendant's conduct or has caused the defendant to alter his position to his detriment. In applying the doctrine of laches, the court will consider the conduct of the plaintiff to determine whether he had

acquiesced in the state of event of which he complains. The court will also consider the position of the defendant to ascertain whether the plaintiffs' position had in any manner affected or prejudiced the defendant. In particular, the court will consider the length of the delay and the nature of the acts done during the interval.

[55] The doctrine of laches has been succinctly described by the judicial committee of the Privy Council in *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 pp 239–240 as follows:

> The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, through perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material.
>
> But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable.
>
> Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy.

[56] This statement was approved by Lord Blackburn in *Emile Erlanger & Ors v New Sombrero Phosphate Co & Ors* (1878) 3 App Cas 1218 at p 1279. Moreover in *Tan Kok Chuan & Anor v Liew Nam Foong* [2000] MLJU 76; [2000] 5 CLJ 533, Abdul Malik Ishak J (as he then was) said:

> *The doctrine of laches has developed over the years. The court will be reluctant to grant relief to stale claims: vigilantibus et non dormientibus lex succurrit. The party who has been dilatory in the prosecution of his claim and has acquiesced in the wrong done to him is said to be guilty of laches and is accordingly barred from obtaining relief although his claim may not be curtailed by the statute of limitation. It pays to be diligent and it also pays to prosecute one's claim with promptitude.* (Emphasis added.)

[57] The subject of laches was admirably explained in *The Principles of Equitable Remedies* by ICF Spry (2nd Ed):

> ... It is established by the course of authorities that proceedings for specific performance will not fail merely because the plaintiff has been guilty of unreasonable delay. In order that relief be refused it is necessary that it should further appear that, as a consequence of that delay, it would be unjust that the plaintiff should obtain an order of specific performance. Admittedly there have

> been cases in which the lapse of time has been treated as itself a bar. But for the greater party they are early cases which were decided at a time when the doctrine of laches had not been fully developed ...

Spry goes on to state:

> ... and the few later cases which appear to follow the early decisions should be treated as either containing observations madeper incuriam, or else turning upon different questions, such as the application of a limitation period by analogy, or else as depending in truth upon an inference in all the circumstances that the defendant had been prejudiced by the material delay or that there had been acquiescence.
>
> By the end of the nineteenth century it had become clear that a defendant must establish, *in order to make out laches, that the delay of which he complains has caused him to be prejudiced or that for some other reason it would be unjust that specific performance be granted. Unreasonable delay alone is not enough.* So in 1874 Lord Selborne (in the case of *Lindsay Petroleum Co v Hurd* (1874) LR PC 221 that ... the doctrine of laches applies where, through the material delay, it would be 'practically unjust to give a remedy', and he added, 'Two circumstances, always important in such cases, are, *the length of the delay* and *the nature of the acts done during the interval*, which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy', and in commenting upon this passage Lord Blackburn subsequently stated, 'I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry it must always be a question of more or less, depending on the degree of diligence which might reasonable be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it.

[58] The Federal Court's decision in *Yong Nyee Fan & Sons Sdn Bhd v Kim Guan & Co Sdn Bhd* [1979] 1 MLJ 182; [1978] 1 LNS 244 His Lordship Hashim Yeop A Sani J (as he then was) said at p 189:

> ... it is an established rule of equity that a plaintiff in equity is bound to prosecute his claim without undue delay. A court of equity would refuse its aid to stale demands, ie, where the plaintiff has slept upon his right and acquiesced for a great length of time. For 'laches' literally means negligent inactivity. He is then said to be barred by his laches. (*Halsbury*'s 3rd Ed Vol 14, p 641). In determining whether there has been such delay as to amount to laches the *main points to be considered are acquiescence on the part of the plaintiff and secondly whether any change of position has occurred on the defendant's part*. Of course, acquiescence depends on 'knowledge, capacity and freedom'.It is not necessary however that the plaintiff should have known the exact relief to which he was entitled. As regards the change in the defendant's position regard must be had whether the defendant has lost the evidence necessary for meeting the claim, for a court of equity will not allow a dormant claim to be set up when the means of resisting it have perished'.

His Lordship continued further:

> To sum up, there can be no hard-and-fast rule in equity. The application of the doctrine of laches or acquiescence must depend on the facts and circumstances of

each case. In the ultimate analysis, therefore the determination of these questions must largely depend on the court which has to decide whether the balance of justice or injustice is in favour of granting the remedy or withholding it. Equity would look primarily at the conduct of parties, sacrificing certainty and inconsistency in order to do justice according to the type of relief sought and the circumstances. The length of the period of inactivity of the plaintiff is no doubt of material consideration but cannot and should not be the sole consideration. Of course, the delay must not be unreasonable but what is reasonable is a question of fact.

[59] It is clear that delay in some circumstances can amount to evidence from which the inference can be drawn that the plaintiff has released (or waived, there seems to be no difference) the claims which he asserts: lapse of time always gives rise to a presumption that a stale suit is ill-founded; for a reasonable man is not likely to sleep on his claims if they are well-founded. Whether it does or does not is a question of fact in each case. My research into the authorities on the subject leads me to the conclusion that there are no fixed rules or principles on which the court acts and each case is considered on its merits and particular facts.

[60] Applying the foregoing to the current facts, the defendant submitted that the plaintiffs have been far from diligent in exercising their rights, and in fact have 'slept' on the same. Enforcement of the SPA ought to have been sought soon after default became clear in 1996. Accordingly, the defendant maintains that this is a clear case of laches and that relief to the plaintiffs ought to be refused.

[61] In regard to the defence of laches raised by the defendant, the evidence adduced by the plaintiffs clearly states that, there were a number of reasons for the inaction of the plaintiffs outlined as follows:

(a) the cause of action having accrued in 2001, the plaintiffs' reasons/explanation for the delay in filing suit has been that the purchaser was ill in 2002 and therefore was not in a position to file suit. The purchaser passed away in 2004. SP1 explained that probate had to be obtained and thereafter, the estate had to be administered. The suit was then filed in 2009;

(b) successive caveats on the land were filed, in 1996, 2002, 2008 and 2009 by the purchaser and subsequently the executor/beneficiaries — at all times throughout, the purchaser/plaintiff continued to exert their rights to the property — no acquiescence, waiver, abandonment or release exists. This is especially so where the defendant has on no less than three separate occasions (ie 2001, 2008 and 2009) demanded that the purchaser/plaintiffs remove the caveats on threat of legal proceedings. Yet no steps were ever taken by the defendant to file to remove the caveats;

(c) there has been no step or action or thing done of any change of position that has occurred on the part of the defendant. The plaintiffs' have neither by their conduct done anything which might fairly be regarded as equivalent to a waiver nor by their conduct put the defendant in a position in which it would not be reasonable to place the defendant if the remedy had been asserted any earlier. On cross-examination, the defendant was asked what her detriment was and what she had done on the land. She confirmed that she has done nothing on the land, expended no monies on the land save for payment of the quit rent and the squatters have remained unchanged since 1996 and even up to now. The defendant stated that she had an un-named buyer at an indeterminate point for RM480,000. On cross-examination, she could not produce any evidence of this. The conclusion to this is that there has been no detriment to the defendant which would prevent or render it inequitable to her if this court were to grant specific performance; and

(d) SD3 has stated that the entire file he held was passed directly to the defendant. She has elected not to produce this in court. She has hired successive lawyers to represent her during that time. During this trial, she has elected to deny letters issued by her previous solicitors (albeit through her present lawyers) and evidentially has attempted to say that it is the plaintiffs who have produced these letters and that the plaintiffs should call these makers. It is common ground that the defendant's own previous solicitors' letters were adduced by her in the former trial. The defendant cannot be heard to complain now.

[62] Applying the above authorities to this case before me while there is indeed considerable delay by the plaintiffs, the crucial factor is to determine whether such delay has resulted in any acts which detrimentally affect particularly to the defendant. This in turn will determine where the balance of justice lies. On the facts of this case, and based on the evidence before this court, it appears that no steps have been taken by the defendant to deal with the property. There was no evidence of any disposition to a third party. In fact, such evidence as there is discloses that the squatters are still residing on the said land throughout the years since the execution of the SPA and no evidence was adduced before this court to show that the squatters had vacated the land.

[63] Furthermore, from the conduct of the purchaser and/or the plaintiffs, it is clear that there never was acquiescence on the part of the purchaser and/or plaintiffs. The purchaser and subsequently the plaintiffs had at all times entered caveat onto the said land so as to protect their interest in the said land.

[64] Given the foregoing, this does not appear to be a case where laches would apply so as to defeat the plaintiffs' claim. While it is indeed true that no tenable explanation was forthcoming from the plaintiffs who were unable to

explain the delay. However, nothing was done by the defendant which resulted in a disposition of the subject property.

Specific performance

[65] I shall now turn my attention to the main issue in dispute in the present case. The plaintiffs in this case sought for an order for specific performance in view of the defendant's breach of the SPA.

[66] An order for specific performance has the effect of ordering a contracting party to do what he has undertaken to do. It is an equitable remedy and the purpose of such decree is to ensure that justice is done (*Tay Tho Bok & Anor v Segar Oil Palm Estate Sdn Bhd* [1996] 3 MLJ 181). It cannot be asked for as of right. It is certainly a discretionary remedy but the discretion cannot be exercised arbitrarily or capriciously. The exercise of the discretion is always governed by fixed rules and principles (*Caesar Lamare v Thomas Dixon* [1873] 6 LRHL 414 at p 423).

[67] Certain factors affecting the court's discretion in granting specific performance may include the issue of delay when asking for the remedy (*Milward v Earl of Thanet* [1801] 5 Ves Jun 719; and *Lazard Brothers & Co Ltd v Fairfield Properties Co (Mayfair) Ltd* [1977] 121 SJ 793). Then the court may have to consider whether the person seeking specific performance is himself prepared to perform his side of the contract (*Chappell v Times Newspapers Ltd* [1975] 1 WLR 482 (CA)). Even a threatened refusal to perform a contract can, in appropriate cases, justify an order for specific performance (*Turner v Bladin* [1951] 82 CLR 463 at p 472).

[68] I will now refer to the Specific Relief Act 1950 (Act 137) ('the SRA') which is the statute governing specific performance in Malaysia. The SRA is quite elaborative and s 21 of the SRA makes reference to the discretionary power of the court to grant specific performance and read as follows:

Section 21

(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant any such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

(2) The following are cases in which the court may properly exercise a discretion not to decree specific performance:

(a) where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant,

though there may be no fraud or misrepresentation on the plaintiff's part; and

(b) Where the performance of a contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

[69] In *Sekemas Sdn Bhd v Lian Seng Co Sdn Bhd* [1989] 2 MLJ 155 the Supreme Court held that the equitable remedy of specific performance was a discretionary remedy and are provided in ss 20 and 21 of the SRA. Although s 20(1)(a) of the SRA provides that a contract will not be specifically enforced if the non-performance of it can be adequately relieved by compensation money, this section however has to be read with some reservation in dealing with contract for the sale and purchase of the property. Section 11(2) of the Act clearly states that there is a presumption that in contracts for the sale of immovable property monetary compensation cannot be an adequate remedy. Section 20(1)(a) is of general application while s 11(2) will prevail in cases involving contracts dealing with sale and purchase of property. The burden is on the defendant to rebut the presumption as held in the Federal Court case of *Loh Koon Moy & Anor v Zaibun SA bt Syed Ahmad* [1978] 2 MLJ 29.

[70] It is imperative that the party seeking specific performance must show to the satisfaction of the court that he is ever ready and willing to perform the contract. Seah FJ in *Ganam d/o Rajamany v Somoo s/o Sinnah* spoke of the need of the plaintiff to be in a state of 'continuous readiness and willingness' from the date of the contract to the time of hearing to perform the contract on his part. Section 23(b) of the SRA bars specific performance of a contract in favour of a person who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed. Here, it will be demonstrated later that the purchaser and/or the plaintiffs were in a continuous state of readiness to perform the SPA.

[71] There is no restriction for the court in granting an order for specific performance to impose such terms as are necessary. Indeed, this was the approach adopted by this court in *Loo Choo Teng & Anor v Cheok Swee Lee & Ors and another appeal* [2000] 2 MLJ 257. It goes without saying that each case must be considered and judged on its own merits. In *Hassan v Ismail* [1970] 1 MLJ 210 (FC), for instance, the court ordered specific performance of an agreement for the sale of a piece of land subject to subdivision and, in so doing, the court required the vendor to submit an application for subdivision to the land office. Again in *Chin Tai v Siow Shiow & Ors* [1971] 1 MLJ 67, the Federal Court granted specific performance of the agreement of sale and directed the vendor to obtain the permission of the collector for the transfer of the land. And in *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd* [1986] AC 207; [1985] 2 All ER 966, the House of Lords ordered specific

performance of a contract of sale of shares subject to the payment by the purchasers of interest for the delay, notwithstanding that the delay was caused by the vendors who were in breach of the contract.

[72] In exercising the court's discretion to order specific performance of a contract for the sale and purchase of land, it is incumbent upon me to be satisfied whether the party in whose favour specific performance is to be ordered was able and willing to settle the payment of the purchase price. The High Court in *Wong Kup Sing v Jeram Rubber Estates Ltd* [1969] 1 MLJ 245, spoke of 'a continuous readiness and willingness to perform the contract from the date of the contract to the date of hearing'.

[73] The plaintiffs had on the point of a continuous readiness and willingness to perform the SPA on the part of the purchaser and/or plaintiffs referred to the case of *Goh Hooi Yin v Lim Teong Ghee & Ors* [1990] 3 MLJ 23; [1990] 2 CLJ Rep 48 where the court had held that proof of purchaser and/or the plaintiffs having access to funds is sufficient to prove their readiness and willingness to complete the SPA.

[74] The defendant had in defence submitted that the purchaser and/or the plaintiff had failed to make any payment to the balance purchase price as stipulated in the SPA which ought to have been deposited into the purchaser's solicitor's account as stakeholder in 1996 and that such payment was only made on 2 September 2013. This as asserted by the defendant is evident that the plaintiffs had failed to prove that there was a continuous readiness and willingness to perform his obligation under the SPA.

[75] Based on the totality of evidence adduced before me, and as found earlier that the defendant had failed to prove that the MOT was delivered to the purchaser's solicitor as required under the SPA. Therefore, the purchaser's duty to pay for the balance purchase price does not arise until the MOT was delivered to the purchaser's solicitor. It is in my considered view that despite the defendant's breach, the purchaser and/or plaintiffs had at all times been ready and willing to perform their part of the terms under the SPA, and this is evident from the correspondence letters between the purchaser's solicitors and the defendant's solicitors indicating that the purchaser was at all times ready and willing to pay the balance purchase price had the purchaser received some form of security from the defendant in respect of the sale and purchase transaction of the said land.

[76] Where a valid contract for the sale of immovable property and breach there of proved coupled with the fact that there is no allegation or evidence that the conduct of the plaintiff's have been such as to disentitle them to the equitable relief sought, the conditions required for the presumption under

s 11(2) of the SRA would be considered to be present (see *Yong Kon Fatt & Anor v Hock Seng Construction Sdn Bhd & Anor* [2000] 5 MLJ 551). The defendant had in my view failed to rebut the presumption under s 11(2) of the SRA.

[77] Guided by the authorities and for the reasons given above, it in my considered view that the plaintiffs had proved their claims to this court's satisfaction, on the balance of probabilities.

CONCLUSION

[78] Turning to the reliefs sought by the plaintiffs, and consonant with the judgment above, the plaintiffs are granted judgment on the following terms:

(a) for the order against the defendant for specific performance of the sale and purchase agreement dated 23 May 1996 be granted;

(b) that the balance purchase price of RM172,306.34 shall be paid to the defendant within thirty days of the date of judgment out of the stakeholder sum of RM192,306.34 held by Messrs A Rajadurai & Assoc;

(c) as the land has already been transferred to the plaintiffs:

  (i) that the plaintiffs be given leave to commence eviction proceedings against the squatters on the land as the registered landowners;

  (ii) that the remaining stakeholder sum of RM20,000 shall be retained by the plaintiff towards part settlement of the costs of eviction proceedings including execution; and

  (iii) that any extra costs of eviction proceedings including execution of the same shall be borne by the plaintiffs;

(d) that the High Court do release the original title to the land and the executed MOT (deposited in court) to the plaintiffs within thirty days of the date of the judgment;

(e) the defendant's counterclaim therein is dismissed; and

(f) the costs of RM20,000 to be paid by the defendant to the plaintiffs being costs of this action.

Judgment granted to plaintiffs and defendant's counterclaim dismissed with costs of RM20,000.

Reported by Nabilah Syahida Abdullah Salleh